IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.525 OF 2005
IN
SUMMARY SUIT NO.1777 OF 2005

BASF India Ltd. ..Plaintiffs

Vs.

Dynatech Packaging P.Ltd. ..Defendants

Ms.Snehal Shah i/b N.Shah & Himayatullah for the plaintiffs

Ms.Anita Castilino i/b Ms.Annie Fernandes for the defendants

CORAM : S.U.KAMDAR, J
DATED : 13TH FEBRUARY, 2006

P.C.:

1. The present suit is filed for the recovery of sum of Rs.20,93,691.97 comprising of principal amount of Rs.10,92,097.26. It is the case of the plaintiffs that the said claim arises out of goods sold and delivered and in respect of which 4 invoices are issued which are set out in para 3 of the plaint. In respect of the aforesaid claim of Rs.10 lacs defendants issued 10 cheques of Rs 1 lac each. The said cheques were dishonoured and the proceedings were initiated under section 138 of the

Negotiable Instruments Act. It is also not in dispute that the said proceedings are withdrawn by the plaintiffs some time in 2004. However, the contention of the plaintiffs is that the said proceedings were withdrawn in the light of the letter dt.15.6.02 being Ex.B1 to the plaint in which the defendants have admitted their liability to pay.

2. On the other hand defendants have filed affidavit in reply interalia claiming therein that infact the said withdrawal was effected after the claim was fully satisfied. My attention is also drawn to the application for withdrawal of complaints which is annexed at Ex.A and B to the affidavit in reply in which it has been stated by the plaintiff themselves that the accused being defendant herein has satisfied the claim of the complainant and hence the complainant does not want to lead any evidence and seeks to withdraw the said complaint. However, the learned counsel for the plaintiffs states that the withdrawal was in view of the aforesaid letter dt.15.6.02 and the claim is not satisfied. He also relies upon judgment of the

learned single Judge of this court in the case of Vijaykumar B.Agarwal v. Govindbhai Dayal Mange and anr. reported in 1999(3) Mh.L.J. in support of the contention that the withdrawal of the complaint is an irrelevant factor while determining the Summons for Judgment. It is also submitted by him that in any event prosecution under section 138 of the Negotiable Instruments Act is not for recovery of claim but is only to punish the accused and therefore withdrawal of said complaint would not come in his way in prosecuting the present suit.

3. I have considered the rival arguments. I am of the opinion that the defendants are entitled to unconditional leave to defend. Firstly, because in the entire plaint no where it has been disclosed that in respect of suit claim the defendants had issued cheques for Rs.10 lacs and such cheques were dishonoured and further that the complaints were filed under section 138 of the Negotiable Instruments Act and the same were prosecuted. Even the circumstances in which the said complaints are withdrawn are also not mentioned inspite of the fact that there was a serious dispute in respect of

the circumstances in which the said complaints have been withdrawn. Thus, in my opinion, there is a material suppression of facts. Secondly, a serious issue arises for trial i.e. whether in the circumstances mentioned herein above the claim of the plaintiffs is already satisfied and therefore, the suit claim cannot be granted. If the claim is already satisfied, question of filing of present suit and prosecuting the same as summary suit does not arise.

4. Looking at the conduct on the part of the plaintiffs including non disclosure of the material fact it is not possible to grant any reliefs to the plaintiff. The contention of the plaintiffs that complaints were withdrawn in 2004 in the light of the letter issued in 2002 cannot be accepted. Apart therefrom on the plain reading of letter dt.15.6.02 it does not call for any withdrawal of the complaint i.e. also almost after 2 years. However, the most clinching evidence is the application of plaintiffs themselves in which while withdrawing the compliant they have mentioned that their claim is duly satisfied. In that light of

the matter, I find that there are serious triable issue arising in the present case, Therefore unconditional leave to defend is granted.

5. Suit to be transferred to the list of Commercial Causes. Written Statement or points of defence to be filed within four weeks from the date of deposit of the said amount. Affidavits, list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes.